

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**LINCOLN AGUIRIANO-MARTINEZ**

Claimant

V.

**ERIS AGUIRIANO**

**KENIR NAVARRO**

**IMA REMODELING, LLC**

**ALL STATE RENOVATIONS, INC.**

Respondents

AND

**TRAVELERS PROPERTY CASUALTY CO.**

**KANSAS BUILDERS INSURANCE GROUP**

Insurance Carriers

Docket No. 1,075,117

**ORDER**

All State Renovations, Inc., and Kansas Builders Insurance Group (All State) request review of the January 8, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden.

**APPEARANCES**

David Curotto, of Olathe, Kansas, appeared for the claimant. Roy T. Artman, of Topeka, Kansas, appeared for All State. Thomas R. Fields, of Kansas City, Kansas, appeared for IMA Remodeling, LLC (IMA). Randall Schroer, of Kansas City, Missouri, appeared for Kenir Navarro. Brent M. Johnston, of Overland Park, Kansas, appeared for Travelers Property Casualty Co. David J. Grummon, of Kansas City, Kansas, appeared for Eris Aguiriano.

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from October 14, 2015; transcript of Preliminary Hearing from November 4, 2015, with exhibits attached; transcript of Preliminary Hearing testimony of Eris Aguiriano (Eris) from November 16, 2015, with exhibits attached; transcript of Preliminary Hearing from January 6, 2016, and the documents of record filed with the Division.

### ISSUES

All State was the general contractor on a job at Cedar Crest Apartments. All State entered into a contract with IMA to build decks at Cedar Crest. IMA was formed by Kenir Navarro, who formerly operated as a sole proprietorship. The sole proprietorship had workers compensation insurance with Travelers Property and Casualty Co., but IMA was uninsured. Kenir Navarro testified he entered into an agreement on behalf of IMA with All State to do work at Cedar Crest Apartments.

The ALJ found a contractual relationship existed between claimant and IMA, and that the evidence indicates claimant was an employee rather than an independent contractor of IMA. The ALJ found no contractual relationship between claimant, and either Eris Aguiriano or Kenir Navarro individually. Claimant's request for temporary total disability benefits was denied because claimant was found to be permanently and not temporarily disabled. Finally, pursuant to K.S.A. 44-503(b), All State was ordered to provide claimant an authorized skilled nursing facility to provide the treatment and testing reasonably necessary for claimant's work-related injuries, as recommended by Megan L. Garcia, M.D.

All State appeals, arguing the credible evidence does not warrant a finding that, at the time of the accident, IMA was claimant's employer. All State does not deny there was a contract between itself and IMA and that claimant was injured while he was replacing wood balconies at the Cedar Crest Apartments on August 31, 2015, as a part of that contract, but contends claimant was an independent contractor and not an employee. All State contends claimant entered into a subcontractor agreement with IMA, that claimant was responsible for his own taxes, was paid on an output basis and had no set working hours. All State contends the ALJ erroneously found: 1. Mr. Navarro supervised and directed claimant's work; 2. IMA provided safety instruction; 3. The integration of claimant's work with IMA's business; 4. All of claimant's work took place at the Cedar Crest job site; 5. Claimant did not provide his own tools; 6. IMA provided some of the equipment used. All State and IMA argue the ALJ's Order should be vacated.

IMA joins All State, arguing that claimant was an independent contractor and not an employee and neither possessed a right of control over claimant in completion of the work at Cedar Crest Apartments.

Kenir Navarro, as an individual and sole proprietor, takes no position on the limited issues presented for appeal because claimant was not in his service.

Claimant argues the ALJ's Order should be affirmed.

The issues on appeal are:

1. Did an employer/employee relationship exist between claimant and IMA?

2. Was claimant a statutory employee of All State?

3. Did the accidental injury on August 31, 2015, arise out of and in the course of claimant's employment with IMA and/or as a statutory employee with All State?

#### **FINDINGS OF FACT**

Any Velasquez testified she was claimant's wife. She testified claimant did remodeling work and on August 31, 2015, was working for Eris, claimant's cousin. Ms. Velasquez testified claimant had been working for Eris for nearly four years and Eris was the only person claimant worked for. She testified claimant's work hours were 8:00 a.m. to 6:00 p.m., and her brother Arturo, also worked for Eris and had the same work hours as claimant.

Ms. Velasquez indicated if a job was not completed satisfactorily, Eris was responsible for making things right. Ms. Velasquez indicated Eris had a variety of ways to compensate his workers, sometimes by the hour and sometimes by the finished job. Claimant did not own a compressor, safety vest or safety harness. He did not bring a ladder to the job site on August 31, 2015.

Ms. Velasquez acknowledged that, in the Latin culture, it is common for someone to scribble on an item when asked for a signature. The signatures on claimant's Exhibits 3, 4, 5 and 6 were all identified as her husband's signatures. She denied the scribble signatures on respondent's Exhibits B, C, and E were claimant's. She has seen her husband sign numerous documents over the course of their marriage, is able to recognize his signature and claimant did not scribble his name in this fashion. Ms. Velasquez indicated claimant always wrote out his name when signing documents.

Arturo Velasquez, claimant's brother-in-law, testified he works for Eris performing construction and remodeling. Mr. Velasquez testified claimant also worked for Eris performing the same type of work. He indicated Eris paid all of the employees in cash every 15 days. Mr. Velasquez indicated that sometimes they were paid by the hour, sometimes they were paid by the foot of work and sometimes by the deck.

On August 31, 2015, claimant was working on a ladder when the ladder came into contact with an electrical line. Claimant suffered an electrical shock and was seriously injured. Mr. Velasquez testified Eris owned the ladder claimant was using on the day he was injured. He indicated claimant did not own a compressor, but one was provided by Mr. Navarro at the job site when there was no electricity in the apartments. Mr. Velasquez indicated Eris and Mr. Navarro supplied the joists, safety vests and safety harnesses for himself and claimant. Eris told them when to show up for work each day, and Eris checked their work product and would have them fix anything that was wrong.

Mr. Navarro testified claimant had to choose whether he would be an independent contractor or to be a part of the payroll and claimant chose independent contractor. Mr. Navarro testified that Eris and Omar Santos witnessed claimant signing the agreement with IMA in Spanish and English, and Eris signed the English agreement. However, Mr. Navarro acknowledged the signature claimed to be claimant's on respondent's Exhibit B to the November 4, 2015, preliminary hearing was different from the signatures represented to be claimant's on claimant's Exhibit 2, 4 and 5 to that preliminary hearing.

Mr. Navarro had claimant and Eris working on decks at Cedar Crest through IMA. He did not monitor claimant's work and did not withhold taxes from his pay. Mr. Navarro testified that when he saw a job was not done right he would call Eris or claimant. He testified All State provided the materials, but claimant and Eris provided their own tools. Mr. Navarro indicated Eris owned the ladder claimant was using when he was injured. Mr. Navarro owned the generator that was on site. Mr. Navarro supplied some of the safety vests or safety harnesses to perform the work at Cedar Crest, and some were provided by Eris. However, the vests were mainly provided by All State.

Mr. Navarro testified All State paid every two weeks. Claimant was given a form to apply for a tax identification number. Mr. Navarro indicated IMA paid claimant and Eris by check and then Eris took his cut and used the rest to pay claimant and the other subcontractors. Mr. Navarro does not know how much Eris paid the others.

Mr. Navarro testified claimant was paid on contract and not by the hour, and that the contract between All State and his company IMA was set by the balcony and was verbal. Mr. Navarro testified as follows:

Q. You contracted with Eris Aguiriano to complete the work that is the subject of this contract, correct?

A. Correct.

Q. You have presented no evidence today that you paid Lincoln Aguiriano pursuant to agreement, contract, what have you, either in cash or by check for any work done at Cedar Crest Apartments; is that correct?

A. Correct, no, not at this time.<sup>1</sup>

During cross-examination, Mr. Navarro testified that Eris was his employee and also a subcontractor with his own employees. Any money paid to claimant would have been the responsibility of Eris.<sup>2</sup>

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<sup>1</sup> P.H. Trans. (Nov. 4, 2015) at 72.

<sup>2</sup> *Id.* at 78.

Eris Aguiriano testified he was performing deck and balcony work at Cedar Crest at the request of Mr. Navarro. Eris testified he was paid between \$700 and \$750 per deck and worked with claimant, someone named Lincoln Wilson, Santo Omar, and Concepcion Ordonez. Eris testified Mr. Navarro would sometimes pay him by check, he would take out \$100 to \$200 for himself and the rest would be given to claimant to split with the others who worked on the job. He testified that this \$100 to \$200 was a benefit he received for lending his tools. At other times, Mr. Navarro would pay claimant or Santo Omar.

Eris testified he worked on jobs other than Cedar Crest for Mr. Navarro. Eris did not consider claimant to be his employee, nor did he consider claimant to be a subcontractor. Eris confirmed that he, along with claimant and Mr. Omar signed paperwork regarding their taxes. He could not confirm that the form they signed had anything to do with Mr. Navarro not withholding taxes from their wages. He noted that the three of them were the only workers with bank accounts and therefore Mr. Navarro would pay them directly.

Eris testified he has worked with claimant on several occasions. He testified the work done for Mr. Navarro was by contract, paid by the unit and not by the hour. The agreement for the work to be done was made orally in January 2015.

Eris verified claimant signed the tax paperwork because he witnessed him doing so. He also indicated that Mr. Omar was present and witnessed claimant signing as well. Eris testified that the general contractor for the Cedar Crest job was All State. He never saw the contract, so he did not know the details. Eris testified he started building decks at Cedar Crest with Mr. Navarro in January 2015. He testified he would pay claimant and claimant would divide the money up and pay the other workers.

Eris indicated he loaned claimant equipment for the job such as two ladders, an electric saw, and a drill. He testified All State and Mr. Navarro provided some safety harnesses and safety classes were provided also. There was a generator on site, provided by Mr. Navarro.

Eris Aguiriano is not IMA. He is not a principal in IMA, but he did consider himself to be an employee of IMA on August 31, 2015. He testified he was paid every two weeks. He further testified:

Q. (By Mr. Curotto) Do you have any evidence whatsoever that Lincoln paid anyone for anything, for any work done at Cedar Crest in August 2015?

A. There is no evidence; there are witnesses, because there is no evidence that I ever paid Lincoln.

Q. Did you ever pay Lincoln for the work he performed at Cedar Crest Apartments in July and August of 2015?

A. I don't, I don't have any evidence.

Q. Did you pay Lincoln in August 2015 for work he performed at Cedar Crest Apartments?

A. Yes, I paid him, but I don't have any . . . .

Q. And you'd pay him by the number of decks he finished?

A. Will you please repeat the question?

Q. Would you pay him according to the number of decks or work he did?

A. Yes.<sup>3</sup>

Eris denies that the ladder claimant was on when he was shocked belonged to him. He thought it belonged to the painter, named Andre. He also indicated that Andre works for IMA. Eris testified the electric company was not notified that work was being completed on Cedar Crest premises. Eris indicated he was not in charge of making sure the job was done right and that Ross (All State supervisor) and Mr. Navarro had that duty.

Q. To summarize your testimony, you paid Lincoln Aguiriano from funds that you received from IMA, correct?

A. Yes.

Q. You provided Lincoln Aguiriano with your tools for him to perform the work at Cedar Crest Apartments, correct?

A. Yes, half of it.

Q. You provided him with three different types of ladders?

A. Yes.

Q. And you provided him with a harness, safety harness?

A. Yes.

Q. You also testified that you checked his work, correct?

A. Yes.

Q. If it was not satisfactory, you would tell him to correct it?

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<sup>3</sup> Eris Aguiriano Depo. at 42.

A. Yes.

Q. If he did work so shotty, so unsatisfactory, so horribly inadequate, you would tell him to get off the worksite, would you not?

A. Well, no, I wasn't going to tell him that. He's my family.

Q. Okay. If he were any other person other than a family member, would you tell him to leave?

A. Well, no, I wouldn't.

Q. Would you correct it yourself?

A. Well, I could say, I mean, I could tell him to do the things right.<sup>4</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

It is not disputed claimant suffered a serious injury on August 31, 2015, while performing work for respondent. The issue is whether, while performing that work, claimant was an employee or an independent contractor with IMA or a statutory employee of All State.

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>5</sup> The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by

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<sup>4</sup> Eris Aguiriano Depo. at 58-60.

<sup>5</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>6</sup>

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control which renders one a servant, rather than an independent contractor.<sup>7</sup>

In addition to the right to control and the right to discharge the worker, other commonly recognized indicators of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.
- (8) Whether the work is part of the regular business of the employer.<sup>8</sup>

In *Hill*<sup>9</sup>, the Court of Appeals stated the court primarily applied the right to control test, but generally considered several additional factors, including:

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<sup>6</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>7</sup> *Wallis*, 236 Kan. at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 780, 402 P.2d 108 (1965).

<sup>8</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>9</sup> *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 (2011).



“(1) [t]he existence of the right of the employer to require compliance with instructions;

“(2) the extent of any training provided by the employer;

“(3) the degree of integration of the worker's services into the business of the employer;

“(4) the requirement that the services be provided personally by the worker;

“(5) the existence of hiring, supervision, and paying of assistants by the workers;

“(6) the existence of a continuing relationship between the worker and the employer;

“(7) the degree of establishment of set work hours;

“(8) the requirement of full-time work;

“(9) the degree of performance of work on the employer's premises;

“(10) the degree to which the employer sets the order and sequence of work;

“(11) the necessity of oral or written reports;

“(12) whether payment is by the hour, day or job;

“(13) the extent to which the employer pays business or travel expenses of the worker;

“(14) the degree to which the employer furnishes tools, equipment, and material;

“(15) the incurrence of significant investment by the worker;

“(16) the ability of the worker to incur a profit or loss;

“(17) whether the worker can work for more than one firm at a time;

“(18) whether the services of the worker are made available to the general public;

“(19) whether the employer has the right to discharge the worker; and

“(20) whether the employer has the right to terminate the worker.”<sup>10</sup>

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<sup>10</sup> *Id.* at 222-223.

Claimant's relationship with IMA appears to be a mixture of employee and independent contractor. There are numerous factors which may be considered in determining an individual's employment status, and many of those factors overlap. "The courts' consideration of so many factors, however, accentuates the overriding principal that each case must stand on its own facts."<sup>11</sup>

In *Travelers*,<sup>12</sup> the court identified the "single most important factor" in determining a worker's status as an employee or independent contractor is "whether the employer controls, or has the right to control, the manner and methods of the worker doing the particular task."<sup>13</sup> "It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor."<sup>14</sup>

Here, IMA, through Mr. Navarro, controlled where claimant worked, the hours worked and, if the work was not satisfactory, Mr. Navarro would instruct either claimant or Eris to fix the problem. This record does not support a finding that claimant provided any of his own equipment. Rather, either Eris or IMA provided most of the equipment.

While witnesses identify the signature on the independent contractor document as being claimant's, claimant's wife refutes that claim. Additionally, it is difficult to accept that claimant would sign his name on numerous documents in one fashion and suddenly change his signature on the independent contractor document. This Board Member finds that alleged signing scenario unpersuasive.

This Board Member finds claimant was an employee of IMA for the purposes of the Kansas Workers Compensation Act and affirms the ALJ's award of benefits.

K.S.A. 2014 Supp. 44-501b(a) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

K.S.A. 44-503 states:

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<sup>11</sup> *Knorp v. Albert*, 29 Kan. App. 2d 509, 514, 28 P.3d 1024, *rev. denied* 272 Kan. 1418 (2001)(quoting Restatement (Second) of Agency § 220 (2)).

<sup>12</sup> *Travelers Indemnity Co. of Ill. v. Challenger Fence Co.*, 34 Kan. App. 2d 276, 119 P.3d 666 (2005).

<sup>13</sup> *Id.* at 279.

<sup>14</sup> *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991).

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed

against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

There was a contract between All State and IMA to build wood decks on Cedar Crest apartments being remodeled by All State. This record indicates All State was the principal with IMA being a subcontractor on the project. Claimant has been found to be an employee of IMA. The work being performed by IMA is found to be a part of All State's trade or business with IMA being contracted to perform same. Being an employee of IMA, claimant would also be a statutory employee of All State, again making All State liable for the injuries suffered by claimant on August 31, 2015.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>15</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has satisfied his burden of proving he was an employee of IMA for the purposes of the Kansas Workers Compensation Act. Claimant is also found to be a statutory employee of All State, pursuant to K.S.A. 44-503.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge William G. Belden dated January 8, 2016, is affirmed.

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<sup>15</sup> K.S.A. 2014 Supp. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2016.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

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